L&S COSMETICS AND TOILETRIES (M) SDN BHD v. PRUDENTIAL CLINIC CARE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KHADIJAH IDRIS J
[SUIT NO: 22NCC-42-01-2019]
30 JULY 2020

CIVIL PROCEDURE: *Documents – Bundle – Agreed bundle – Amendment to issues to be tried – Application to move documents from Part A to Part B – Factors to be considered – Whether genuine mistake – Whether delay in application – Whether amendment provides unfair opportunity to renew claim – Whether facts and issues within knowledge of parties – Whether application would result in gross miscarriage of justice*

The plaintiff was engaged in the business of manufacturing and wholesaling of cosmetics and toiletries products, whilst the defendant was in the business of trading wet fabric and paper products for skincare and toiletries and personal care products. The subject matter of the plaintiff's claim against the defendant was the sum of RM1,278,558.50, which remained outstanding for the cosmetics and toiletries products sold and delivered to the defendant. On the other hand, the defendant's case was that the defendant appointed the plaintiff to manufacture baby wet wipes and the defendant would supply and onsell the baby wet wipes to Anakku Sdn Bhd ('Anakku'), to be marketed and sold as Anakku's baby wet wipes. The defendant alleged that the plaintiff, in breach of its obligations, had repeatedly manufactured and supplied batches of contaminated Anakku Baby Wipes which endangered the health and safety of babies/consumers. Despite their agreement, the plaintiff failed to carry out a full trade recall on the affected batches of Anakku Baby Wipes and provide a one-to-one replacement and to remove the entire batches of contaminated Anakku Baby Wipes from Anakku's warehouse. Anakku claimed against the defendant for losses and damages suffered arising from the contaminated Anakku Baby Wipes and imposed storage charges against the defendant in respect of the contaminated Anakku Baby Wipes. As a result, the defendant lost its goodwill and business reputation and also lost Anakku as a customer. The defendant therefore counterclaimed against the plaintiff for a sum of RM4,168,557.17 for the losses and damages suffered by the defendant. During the course of full trial, the defendant filed an application ('encl. 99') to amend the additional common bundle of documents (Part A) by removing certain documents that had been previously agreed to by both parties to be classified under Part A, to be re-classified and placed under Part B. Enclosure 99 was made pursuant to O. 20 and O. 92 r. 4 of the Rules of Court 2012.

Held (allowing encl. 99):

(1) Documents under Part A are documents which parties accept as being authentic and the existence of the same is accepted and the contents or the truth of such documents is not in issue. Documents which are placed in Part B are documents where the authenticity is agreed but the contents are in dispute, whereas, Part C deals with a situation where the parties could not agree on either the authenticity or the content of the documents. (para 21)

(2) Enclosure 99 was filed by the defendant almost immediately after the plaintiff pointed out that the plaintiff's affidavits 1-3 were placed under Part A. Upon being notified of the mistake, the defendant promptly made an oral application for the said affidavits to be moved out of Part A and to be placed in Part B. Therefore, there was no delay. Even if there was a delay, based on the circumstances and the facts, the delay and the absence of cogent reasons to explain the delay was not fatal and could be compensated with costs. (paras 26 & 27)

(3) The underlying issue was whether the contamination of the Baby Wet Wipes supplied by the plaintiff to the defendant was caused by the plaintiff. Crucially related to the underlying issue were factors which caused the defendant to have lost its business with Anakku. This was clearly stated in the amended issues to be tried. The parties' amended issues to be tried was filed after the filing of the additional common bundle of documents. The amended statement of agreed facts did not support the plaintiff's contentions that the issues listed had been agreed by both parties. The plaintiff's counsel, though aware of the inconsistencies well before the trial started, chose not to alert the defendant's counsel. Hence, for the plaintiff to say that the defendant's change of position was a 'huge surprise' was an exaggeration. (paras. 31-35)

(4) The placing of the plaintiff's affidavits 1-3 was a mistake of the defendant's counsel. Although the circumstances and facts warranted the court to exercise its discretion to allow encl. 99, it did not mean that the court condoned to the defendant's mistake. The mistake of the defendant's counsel was genuine and thus, the amendment sought in encl. 99 was not *mala fide* and encl. 99 was not a tactical manoeuvre. The defendant ought not to be penalised for the mistake of their counsel. Hence, in the interest of justice and to enable the court to deal with the real question in dispute between the parties, the court was constrained to allow encl. 99 and for the plaintiff's affidavits 1-3 to be placed in Part B. (paras 36 & 37)

(5) The amended issues to be tried was agreed by the parties and it was filed after the filing of the additional common bundle of documents. The filing of the amended issues to be tried was also a voluntary agreement by both parties to identify and narrow down the relevant and material issues in relation to the claims both parties had against each other. The amended issues to be tried was the most recent and relevant document which reflected the parties' position as to the issues in dispute. Accordingly, there was no valid reason why the amended issues to be tried should be ignored or that it was to take second place to the additional common bundle of documents. (para 39)

(6) The circumstances leading to the relevant document being placed under Part A were relevant factors to be taken into consideration in determining the merits of encl. 99. Although the application to move the said affidavits from Part A and place it in Part B was made during the trial, it was made at an early stage of the cross-examination of the plaintiff's very first witness and the plaintiff was thus not prejudiced. Moreover, the plaintiff's affidavit 1, which was filed to resist the defendant's application for summary judgment, set out a string of issues which the plaintiff claimed to be triable issues. The facts and issues in the plaintiff's affidavit 1 were well within the knowledge of the plaintiff and represented the issues in dispute between the plaintiff and defendant. It was the very facts and issues which the plaintiff relied on to defend itself against the defendant's defence and counterclaim. (paras 44-46)

Case(s) referred to:

Chin Hua Sawmill Co Sdn Bhd v. Tuan Yusoff Tuan Mohamed [1973] 1 LNS 15 FC ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***

Pfizer Ireland Pharmaceuticals v. Ranbaxy (Malaysia) Sdn Bhd [2013] 3 CLJ 61 CA ***(refd)***

Tiow Weng Theong v. Melawangi Sdn Bhd [2019] 2 CLJ 655 CA ***(dist)***

Tong Kim Soo v. Tirai Prospektif Sdn Bhd [2020] 3 CLJ 353 CA ***(refd)***

Yeo Ing King v. Melawangi Sdn Bhd [2017] 1 CLJ 512 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 20 r. 8, O. 34 r. 2(2)(d), O. 55 r. 5(3), O. 92 r. 4

For the plaintiff - Etrus Tan Chen Hee, Esther Ong Hui Chuen & Nurul Aida Mat Rifin; M/s Esther Ong, Tengku Saiful & Sree

For the defendant - Chew Chang Min, Mary-Ann Ooi Suan Kim & Daryl Kong Kai Xuan; M/s OS Kim & Assocs

Reported by S Barathi

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JUDGMENT
(encl. 99)

Khadijah Idris J:

Introduction

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[1] The plaintiff filed this writ action against the defendant to recover a sum of RM1,278,558.50 being the outstanding amount for goods sold and delivered.

[2] During the course of full trial, the defendant filed an application (encl. 99) to amend the additional common bundle of documents (Part A) by removing certain documents that have been previously agreed by both parties to be classified under Part A to be re-classified and placed under Part B. Enclosure 99 was made pursuant to O. 20 and O. 92 r. 4 of the Rules of Court 2012 ("ROC 2012").

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[3] After considering the parties' submissions, this court allowed the defendant's application to re-classify the documents and for the same to be placed under Part B.

Plaintiff's Pleaded Case

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[4] The plaintiff is a locally incorporated company engaged in the business of manufacturing and wholesaling of cosmetics and toiletries products.

[5] The defendant, also a locally incorporated company engaged in the business of trading wet fabric and paper products for skincare and toiletries and personal care products.

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[6] Between August 2014 to October 2015 the plaintiff has sold and delivered cosmetics and toiletries products such as facial masks, shampoo, shower cream and wet wipes to the defendant.

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[7] It is the plaintiff's case that the defendant failed to pay a sum of RM1,278,558.50 which remain outstanding and the subject matter of the plaintiff's claim against the defendant in this writ action.

Defendant's Pleaded Case

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[8] The defendant had appointed the plaintiff to manufacture baby wet wipes and the defendant would supply and onsell the baby wet wipes to Anakku Sdn Bhd ("Anakku'). The baby wet wipes would be marketed and sold as Anakku's baby wet wipes ("Anakku Baby Wipes").

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[9] The plaintiff breached its obligations as a manufacturer to manufacture products which are of merchantable quality fit and safe for all intents and purposes for consumer use. This is because it has repeatedly manufactured and supplied batches of contaminated Anakku Baby Wipes specifically for baby use which endangers the health and safety of babies/consumers.

[10] Despite their agreement to, *inter alia*, carry out a full trade recall on the affected batches of Anakku Baby Wipes and provide a one to one replacement and to remove the entire batches of contaminated Anakku Baby Wipes from Anakku's warehouse, the plaintiff failed to do so.

[11] As a result of the plaintiff's failure, Anakku demanded against the defendant losses and damages suffered by Anakku arising from the contaminated Anakku Baby Wipes. Anakku had also imposed storage charges against the defendant in respect of the contaminated Anakku Baby Wipes which the plaintiff failed to remove from Anakku's warehouse.

[12] As a result of the contaminated Anakku Baby Wipes manufactured by the plaintiff, the defendant's goodwill and business reputation was ruined. Anakku has ceased to order and purchase any baby wet wipes from the defendant and the defendant had lost Anakku as a customer. Thus the defendant counterclaims against the plaintiff a sum of RM4,168,557.17 being the losses and damages suffered by the defendant.

Enclosure 99

[13] Enclosure 99 was made pursuant to O. 20 r. 8 of the RoC 2012 which provides the court may at any stage of a proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner as the court may direct. In *Pfizer Ireland Pharmaceuticals v. Ranbaxy (Malaysia) Sdn Bhd* [2013] 3 CLJ 61 it was held that the power of the court to order an amendment under O. 20 r. 8 of the RoC are restricted and confined only to court documents and pleadings. In the instant case, it is not disputed by the plaintiff that the additional common bundle of documents are court documents.

[14] On the first day of trial ie 2 March 2020, during cross-examination of the plaintiff's first witness (PW1), objections were raised by counsel for the plaintiff to some questions posed by the defendant's counsel on the ground that the questions asked, relate to facts which were not disputed by the defendant. This is because the questions posed are matters stated in the plaintiff's affidavits which are already agreed by parties to be placed in Part A. Thus the matters are deemed to have been agreed by the parties as true and therefore no further proof is required.

[15] The defendant's oral application for the said documents to be removed from Part A and placed in Part B was objected to by the plaintiff. This court then directed the defendant to file a formal application and for parties to submit.

[16] *Via* encl. 99, the defendant seeks the following order:

> 1. Bahawa dokumen-dokumen berikut dalam Ikatan Dokumen Bersama Tambahan (Part A) yang mana sebelum ini telah diklasifikasikan sebagai Bahagian A ("Dokumen-Dokumen Bahagian A"), untuk dipinda dan diubahkan kepada Bahagian B:-

(a) Afidavit Jawapan Plaintif (Untuk menolak Lampiran 12) yang diikrarkan oleh Peter Charles Smerling pada 7.5.2019;

(b) Afidavit Sokongan Plaintif (Lampiran 18) yang diikrarkan oleh Peter Charles Smerling pada 15.5.2019; dan

(c) Afidavit Balasan Plaintif (Lampiran 18) yang diikrarkan oleh Peter Charles Smerling pada 30.5.2019.

2. Kos untuk permohonan ini adalah kos dalam kausa; dan

3. Relif-relif lanjutan atau lain yang difikirkan sesuai dan wajar oleh Mahkamah yang Mulia ini.

[17] The affidavits referred to in prayer 1 of encl. 99 will be referred to as follows:

(a) the affidavit in the said prayer 1 (a) is encl. 14 and will be referred to as "plaintiff's affidavit 1";

(b) the affidavit in the said prayer 1 (b) is encl. 19 and will be referred to as "plaintiff's affidavit 2"; and

(c) the affidavit in the said prayer 1 (c) is encl. 44 and will be referred to as "plaintiff's affidavit 3".

The plaintiff's affidavit 1, plaintiff's affidavit 2 and plaintiff's affidavit 3 will collectively be referred to as the "plaintiff's affidavits 1-3".

Defendant's Contentions

[18] The defendant forwarded the following grounds to support its application:

(a) the issue in question is whether Anakku ceased its business with the defendant due to the supply of contaminated wipes by the plaintiff or due to the service provided by defendant to Anakku. Such issue is not an agreed fact as it is an issue which is agreed to be tried by both parties. This is evident from the document amended statement of agreed facts and amended issues to be tried marked ac "C" and "D" respectively;

(b) the plaintiff's first witness PW1 has alluded to this issue in his witness statement (PW1-WS). As such, the defendant is entitled to cross-examine PW1 on this issue. The plaintiff will not be prejudiced as they are entitled to re-examine PW1 subsequently; and

(c) the plaintiff's affidavits 1-3 were filed by the plaintiff in response to two affidavits filed by the defendant, namely defendant's affidavit in support (encl. 13) affirmed by Seng Sin Mon on 19 April 2019 ("defendant's affidavit 1") and defendant's affidavit in reply (encl. 20) affirmed by Seng Sin Mon on 21 May 2019 ("defendant's affidavit 2"). The defendant's affidavit 1 and the defendant's affidavit 2 are classified as Part B documents. Thus it is only appropriate for the plaintiff's

affidavits 1-3 be classified as Part B documents. The defendant's affidavit 1 and defendant's affidavit 2 will be collectively referred to as "defendant's affidavit 1 and 2". A

Plaintiff's Contentions

[19] The plaintiff's main grounds of objection are as follows: B

(i) the issues which have been agreed pursuant to the documents classified as Part A documents are as follows:

(a) only 3.15% of the 30 packs were contaminated;

(b) the defendant's loss of Anakku Sdn Bhd was due to the defendant's poor service; C

(c) plaintiff was indeed willing to exchange for the affected packets during the contamination issue in year 2015;

(d) there was no necessity for the plaintiff to perform the full trade recall during the contamination issue in year 2015; D

(e) the contamination issue for year 2015 only restricted to 30 packs;

(f) not all wipes during the contamination issue for the year 2015 were 100% defective;

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(g) the contamination issue for the year 2015 was an isolated case and it should be taken into consideration that factors such as the condition of the Anakku's warehouse in which the baby wipes were stored at that material time and/or the weather might be a contributing factor to the said contamination of the baby wet wipes; F

(h) the defendant had failed to engage and/or to provide assistance in rectifying the contamination issue with Anakku;

(i) Anakku did not see the value of having the defendant as a middle man; and

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(j) Anakku purchased the wipes directly from the plaintiff since June 2015.

(ii) if encl. 99 is allowed, it would prejudice the plaintiff as the plaintiff has filed and exchanged their witness statements on the basis that the issues stated in para. 19(i) above had been agreed in Part A documents; H

(iii) there is gross delay on the part of the defendant in filing encl. 99. Furthermore, no cogent reason was given for the undue and gross delay in making such application; and

(iv) if the application is allowed, the inordinate delay would cause gross miscarriage of justice to the plaintiff that cannot be compensated with costs because it would not be possible to have a fair trial since the defendant's counsel had an opportunity to cross-examine PW1 which would give the defendant a "second bite of the cherry". I

A **Findings Of The Court**

[20] The provisions with regard to the amendment of pleadings are provided for in O. 20 of the ROC 2012. Pursuant to O. 20 r. 8, the court has the discretion to allow amendment to be made at any stage of the proceedings to any document in the proceedings for purpose of determining
B the real question in controversy between the parties on such terms as to cost or otherwise as may be just and in such manner as the court may direct. The Federal Court in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1, [2016] 1 MLJ 301, [2016] 3 MLRA 81 held in cases where late application to amend is filed, the following factors must be taken into
C consideration:

(i) whether there is a cogent and reasonable explanation as to why the application was filed late;

(ii) whether the application to amend the pleadings is a tactical manoeuvre;
D and

(iii) whether the lateness in making the application to amend the pleadings cannot necessarily be compensated by payment of costs.

[21] It is trite that documents which are placed under Part A are documents which parties accept as being authentic and the existence of the same is
E accepted. Also, the contents or the truth of such documents is not in issue. Thus the contents of Part A documents are agreed and accepted by parties. While documents which are placed in Part B are documents where the authenticity is agreed but the contents are in dispute. Whereas Part C deals with a situation where the parties could not agree on either the authenticity
F or the content of the documents (see Court of Appeal case in *Tiow Weng Theong v. Melawangi Sdn Bhd* [2019] 2 CLJ 655; [2018] 6 MLRA).

[22] Before discussing the merits of encl. 99, it is helpful to understand the contents of the plaintiff's affidavits 1-3 which are summarised below:

G (i) Plaintiff's affidavit 1 (encl. 14)

(a) the said affidavit was filed as a response to the defendant's affidavit 1 (encl. 13) which is the defendant's affidavit supporting its application to enter summary judgment in respect of its counterclaim against the plaintiff;

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(b) in resisting the summary judgment application, the plaintiff sets out the issues which are triable and this includes, among others, the following:

(1) the defendant's allegation that all the Baby Wet Wipes
I manufactured and delivered by the plaintiff were defective and not of merchantable quality is unsubstantiated, false and untrue;

(2) based on random inspection done at Anakku warehouse, the Anakku Baby Wipes affected limited only to a few of the 30's pack size and not the 40's pack size as initially pleaded in the plaintiff's reply to defence and defence to counterclaim;

(3) even within the 30's pack size not all the wipes were 100% defective. Thus no reason for plaintiff to perform a total trade recall of the baby wipes from Anakku's warehouse;

(4) the contamination issue in 2015 is an isolated case and factors such as the condition of the Anakku warehouse in which the Baby Wet Wipes were stored at the material time and/or the weather may be a contributing factor to the said contamination of the same;

(5) the reason for Anakku ceases business relationship with defendant was due to the defendant's irresponsible behaviour towards Anakku in failing to engage and provide assistance in rectifying the contamination incident.

(ii) The defendant subsequently replied *via* defendant's affidavit 2 (encl. 20) refuting the triable issues as alleged by the plaintiff on the following grounds:

(a) there is unequivocal admission of defects of the Baby Wet Wipes manufactured by the plaintiff;

(b) the performance of random inspection to arrive at a unilateral conclusion that the Baby Wet Wipes were not 100% defective is unacceptable and the plaintiff is not absolved from its liability;

(c) the defendant denies the reason for Anakku to stop trading with the defendant is due to its failure to provide assistance to Anakku in respect of the contamination issue. It is the defendant's position that the plaintiff had, since 2015, through their wholly-owned marketing company, been soliciting and enticing Anakku by offering to sell the Baby Wet Wipes directly to Anakku at a lower price and without having to go through the defendant. This has caused the defendant to have lost the business and sales to Anakku.

(iii) The plaintiff's application for summary judgment was dismissed by this court and the plaintiff was granted leave to amend its reply to defence and defence to counterclaim.

(iv) Plaintiff's affidavit 2 (encl. 19)

(a) the said plaintiff's affidavit was filed to support its application for leave (encl. 18) to amend its reply to defence and defence to counterclaim;

A (b) *via* the said application, the plaintiff sought to amend its reply to defence and defence to counterclaim to reflect the plaintiff's position that the affected Baby Wet Wipes is only in respect of the 30's pack size and not the 40's pack size.

(v) Plaintiff's affidavit 3 (encl. 44)

B (a) the said plaintiff's affidavit is in response to the defendant's affidavit (encl. 23) objecting to the plaintiff's application to amend its reply to defence and defence to counterclaim;

(b) it is argued by the plaintiff that the proposed amendment is *bona fide* C as it merely rectifies a genuine mistake and that it is not prejudicial to the defendant.

Whether There Is Any Delay And Delay, If Any, Can Be Compensated With Costs

[23] As highlighted by the plaintiff, parties were directed to file all bundles D of document before 7 November 2019 and that was accordingly complied with. Thus between November 2019 and the date encl. 99 was filed, there is a gap of four months. According to the plaintiff, there is a delay of four months on the part of the defendant in filing the same and the defendant failed to offer any reason for their delay.

E **[24]** It is further argued by the plaintiff that by filing encl. 99, the defendant has breached the court direction under O. 34 of the ROC 2012. The plaintiff cited the case *Tong Kim Soo v. Tirai Prospektif Sdn Bhd* [2020] 3 CLJ 353; [2019] MLRAU 296 where the Court of Appeal said the Rules of Court must *prima facie* be obeyed, otherwise it would defeat the purpose of the rules F which is to provide a timetable for the conduct of litigation.

[25] With regards to the contentions at para. 24 above, such contentions are misconstrued. In so far as filing the additional common bundle of documents is concerned, there is no issue of the defendant breaching or not complying with the court's direction for the additional common bundles of G document to be filed. The parties have finalised their documents which are relevant to their case and have in fact filed the additional common bundle of documents as directed by the court (*Tong Kim Soo v. Tirai Prospektif* (*supra*)).

[26] Enclosure 99 was filed by the defendant on 3 March 2020 which was H almost immediately after the plaintiff pointed out, on 2 March 2020, that the plaintiff's affidavits 1-3 are placed under Part A. Placing the plaintiff's affidavits 1-3 in Part A turned out to be a mistake on the part of the defendant, which was only discovered during trial. Upon being notified of the mistake, the defendant promptly made an oral application for the said I affidavits to be moved out of Part A and to be placed in Part B, to which the plaintiff objected. It is apparent for four months (from date of filing additional bundle of documents to the first day of trial) the defendant has no

issue with the placement of the plaintiff's affidavits 1-3 in Part A or rather, the defendant is not aware of the mistake until they were told of the same on the first day of trial. Thereafter, the defendant promptly filed encl. 99. There is no delay.

[27] Assuming there is delay on the part of the defendant, this court is of the view based on the circumstances and facts of this instant case which is set out below, the delay and absence of cogent reasons to explain the delay is not fatal. Also, delay, if any can be compensated with costs.

[28] The plaintiff relies on *Hong Leong Finance Bhd v. Low Thiam Hoe* (*supra*) to support its contentions that the delay is fatal. It is my view that the facts in that case are significantly different from the instant case. Whilst the instant case involves an application under O. 20 of the ROC 2012 made in the midst of the trial (as in *Hong Leong Finance Bhd v. Low Thiam Hoe* (*supra*)), it does not concern an amendment proposed to be made to pleadings. Crucially, the defendant's encl. 99 is not concerned with introducing two new and distinct defences which if so, would certainly be *mala fide*. Thus there is certainly no issue of the defendant being given an unfair opportunity to renew its claim against the plaintiff on the basis of an entirely new or different set of facts which was not pleaded earlier at the beginning of this action. Thus, the severity of the defendant's encl. 99 somewhat pale in comparison with the application to amend the defendant's statement of defence in *Hong Leong Finance Bhd v. Low Thiam Hoe* (*supra*).

Whether Enclosure 99 Is A Tactical Manoeuvre And Whether The Plaintiff Is Prejudiced

[29] As stated above, encl. 99 was filed by the defendant after it was pointed out (during the early stage of PW1's cross-examination) by the plaintiff's counsel that the cause for Anakku to cease its business with the defendant has already been agreed between the parties because plaintiff's affidavits 1-3 are placed under Part A. Whereas it is the defendant's position that such issue is disputed as the parties have agreed for such issue to be tried.

[30] With regards to issues to be tried, the parties have agreed, *via* the amended issues to be tried (marked "C"), the triable issues are as follows:

1. Whether the Plaintiff is entitled to the purported sum of RM964,356.77 and in this connection:
   (a) Whether the Plaintiff has delivered the goods for the sum of RM 964,356.77 ("the said goods");
   (b) Whether there is any contamination and/or defect in the said goods
2. Whether the contamination was caused by the Plaintiff, and in this connection:

(a) whether the nature and extent of contamination amounted to fundamental breach by the Plaintiff;

(b) whether the Plaintiff as manufacturer has breached its duties and obligations by acting contrary to the good manufacturing and/or distribution practices.

3. If the issues in paragraph 1 above are in the affirmative, whether the Defendant is entitled to set off the Plaintiff's claim for the purported sum of RM 964,356.77, for the damages and losses in Paragraph 14 of the Amended Defence and Counter-claim dated 15.08.2019 as follows:

A. Returned goods of RM7,979.87;

B. Loss of Sales due to Contaminated Wipes of RM137,432.13;

C. Returned Contaminated Wipes of RM677,094.08;

D. Rental for Bukit Rahman Putra Office of RM20,808.00;

E. Expenses/Purchase paid by the Defendant on behalf of Plaintiff for the sum of RM105,682.01;

F. 3% discount for early settlement of RM694.40;

G. Errors in Plaintiff's ledgers for the sum of RM17,783.37;

H. Disposal costs and storage costs of RM82,644.00.

4. If the issues in Paragraph 1 above is in the affirmative, whether the Defendant has suffered the loss of business of RM4,087,796.00 with Anakku and in this connection:

i. Whether loss of business from Anakku was due to the contamination of the wet wipes or was due to the Defendant's own behaviour in falling to engage with their Client;

ii. Whether the Defendant's claim for loss of business is excessive.

5. If the issues in Paragraph 1 above is in the affirmative, whether the Defendant has suffered the loss of goodwill and business reputation due the contamination incident. In this regard:

i. Whether such loss of goodwill and damage to the business reputation was caused by the Plaintiff;

ii. Whether such damage and goodwill and business reputation was within the contemplation of both parties at the time of the contract.

[31] Based on the amended issues to be tried and the parties' pleadings, the underlying issue is whether contamination of the Baby Wet Wipes supplied by the plaintiff to the defendant was caused by the plaintiff and this is a live issue. This underlying issue will consequentially determine the validity of the plaintiff's claim against the defendant (for outstanding sum of RM964,356.77) and the plaintiff's liability towards the defendant's counterclaim (for the sum of RM4,087,796 being loss of Anakku's business).

[32] Crucially, related to the underlying issue are issues in relation to the factor which caused the defendant to have lost its business with Anakku. This is clearly stated in para. 4(i) of the amended issues to be tried which is intended to be read with para. 1 of the same. The said para. 1 raise the issue whether the Baby Wet Wipes delivered to the defendant by the plaintiff was contaminated and/or defective and this will in turn determine whether the plaintiff is entitled to RM964,457.77 being the payment for the delivery of the Baby Wet Wipes by plaintiff to the defendant.

[33] It is pertinent to note that the parties' amended issues to be tried were filed on 27 November 2019 which was after the filing of the additional common bundle of documents on 1 November 2019. Thus the plaintiff's contentions that:

(i) the defendant's loss of Anakku's business is due to the defendant's poor service; and

(ii) the defendant has failed to engage and provide assistance in rectifying the contamination issue with Anakku are issues which have been agreed by the parties because the plaintiff's affidavits 1-3 are placed under Part A is misconstrued.

[34] Moreover, the amended statement of agreed facts does not support the plaintiff's contentions that the issues listed at para. 19 above have been agreed by both parties. In the circumstances, it can be safely said that the plaintiff's counsel is well aware of the inconsistencies well before the trial starts but chose not to alert the defendant's counsel. Even if the plaintiff takes the position that they are not obliged to inform the defendant's counsel, the plaintiff's counsel should have alerted this court. After all, counsels are bound to assist this court in the administration of justice.

[35] Instead, the plaintiff as stated in their submissions has proceeded to prepare their case including preparing the witness statement of their witnesses on the basis that the contents of the plaintiff's affidavits 1-3 are admitted by the defendant. It is not difficult to fathom out the reason why plaintiff chose to take such approach – they perceived it to be to their advantage despite their agreement *via* the amended issues to be tried that the cause of Anakku to cease business with defendant is a disputed fact which is to be tried. The plaintiff cannot be blamed for taking such approach. However, considering the circumstances and facts to say, (in the words of the plaintiff's counsel) that the defendant's change of position is a "huge surprise" to the plaintiff is, with respect, an exaggeration.

[36] This court concedes with the plaintiff's contentions that the placing of the plaintiff's affidavits 1-3 is simply the mistake of the defendant's counsel. The plaintiff argued this court should not condone the mistake of the defendant's counsel and relies on the case *Tong Kim Soo v. Tirai Propsektif Sdn Bhd* (*supra*) (a case where appellant failed to comply with O. 55 r. 5(3) ROC

2012 which requires record of appeal to be filed within one month after the filing of the notice of appeal due to the mistake of its previous solicitor) where the Court of Appeal adopted the view of the Federal Court in *Chin Hua Sawmill Co Sdn Bhd v. Tuan Yusoff Tuan Mohamed* [1973] 1 LNS 15; [1973] 1 MLRA 764; [1974] 1 MLJ 58 which said a mistake is a mistake whatever may be the reason for it. The Court of Appeal said for an application to extend time to succeed, there must be circumstances which warrant the exercise of the court's discretion in favour of the appellant and that a mistake or oversight on the part of the appellant's solicitor is not sufficient ground for granting extension of time.

[37] In this instant case, the circumstances and facts warrant this court to exercise its discretion to allow encl. 99. It must be emphasised that this does not mean this court condones the defendant's mistake. However, in the context of the circumstances and facts, it is the considered opinion of this court that the mistake of the defendant's counsel is genuine. Thus, the amendment sought in encl. 99 is not *mala fide*. Enclosure 99 is not a tactical manoeuvre. Under such circumstances, the defendant ought not to be penalised for the mistake of their counsel. In the interest of justice and to enable this court to deal with the real question in dispute between the parties, this court is constrained to allow encl. 99 and for the plaintiff's affidavits 1-3 is to be placed in Part B.

[38] It is further argued by the plaintiff that this court ought not to consider the amended issues to be tried as it is a separate issue from the voluntary agreement of the parties in categorising the additional common bundle of documents. To support such contentions, the plaintiff relies on the dissenting judgment in the Court of Appeal case of *Yeo Ing King v. Melawangi Sdn Bhd* [2017] 1 CLJ 512; [2016] 5 MLJ 631. However, the facts in the said case did not indicate that after the relevant documents (being three letters which contain statements alleged to be defamatory of the plaintiff) were agreed by both parties to be placed in Part A, the parties subsequently agreed that the issue whether the alleged statement is defamatory is a triable issue to be determined by the court.

[39] As stated above, the amended issues to be tried was agreed by the parties and it was filed after the filing of the additional common bundle of documents. It must be noted that the filing of the amended issues to be tried is also a voluntary agreement by both parties to identify and narrow down the relevant and material issues in relation to the claims both parties has against each other. As far as sequence is concerned, the amended issues to be tried is the most recent and relevant document which reflects the parties' position as to the issues in dispute. Accordingly, there is no valid reason why the amended issues to be tried should be ignored or that it is to take second place to the additional common bundle of document.

[40] The plaintiff relies heavily on the Court of Appeal case of *Tiow Weng Theong v. Melawangi Sdn Bhd* (*supra*) which sets out the position of the law as to the consequences and effect of documents which are placed under Part A, Part B and Part C as required under O. 34 of the ROC 2012. In the said case, the plaintiff sued the defendant for defamation premised on two documents, namely, a letter and an email. The document relevant to the instant case is the email which was placed under Part A in the common bundle of documents. It was the finding of the learned trial judge that the defendant had defamed the plaintiff in the email.

[41] On the facts, the Court of Appeal concluded that the plaintiff agreed to place the e-mail in Part A and that it was the plaintiff who insisted the e-mail to remain in Part A. The Court of Appeal concluded the categorisation of the email in Part A effectively means that the contents are not in dispute or are agreed upon. Thus the learned trial judge had erred in holding that the documents in Part A required proof of the truth of the contents of the documents. As the plaintiff agreed to the contents, the plaintiff effectively accepts what is stated in the e-mail. The Court of Appeal opined agreeing and accepting the contents of the e-mail means that the plaintiff accepts the truth of the same. This in turn can only lead to the legal consequence that justification is made out.

[42] The plaintiff obtained leave to appeal against the decision of the Court of Appeal on five questions which includes, among others, whether documents that are included in Part A of an agreed bundle of documents pursuant to O. 34 r. 2(2)(d) of the ROC 2012, which were then admitted and marked as evidence during trial meant that the authenticity and the truth of the contents of the documents had been agreed and accepted and/or could not be challenged.

[43] The Federal Court declined to answer the questions on the ground, among others, the judgment of the Court of Appeal was based upon a wrong premise of facts. The apex court found the judgment of the Court of Appeal was anchored on the primary ground that the plaintiff had agreed and insisted to place the e-mail in Part A of the agreed bundle of documents. Based on the notes of proceedings and what actually transpired during the course of the High Court proceedings, the Federal Court found the plaintiff all along wanted to remove the e-mail from the category known as Part A and for it to be placed in Part B. Thus it was the Federal Court's views that the observation of the Court of Appeal that the plaintiff "insisted on the e-mail remaining in Part A" is a mistaken reading of the true stand taken by the plaintiff through his counsel. As such, it was held the underlying basis for the Court of Appeal to justify its appellate intervention was, wholly untenable and this in itself sufficient to warrant appellate intervention.

[44] It is pertinent to note both the Court of Appeal and Federal Court in the process of determining the status of the email had considered the facts which transpired before trial commenced and during the course of trial. Thus, the circumstances leading to the relevant document being placed under Part A are relevant factors which this court has to take into consideration in determining the merits of encl. 99.

[45] In the instant case, the circumstances and facts surrounding the placement of the plaintiff's affidavits 1-3 are as stated above. Although the application to move the said affidavits from Part A and place it in Part B was made during the trial (and not before the commencement of the trial like in *Tiow Weng Theong v. Melawangi Sdn Bhd* (*supra*)), it was made at an early stage of the cross-examination of the plaintiff's very first witness. The plaintiff is not prejudiced as they are not deprived of their right to re-examine their first witness or any other witnesses on, *inter alia*, matters relating to the factors which caused Anakku to cease its business relationship with the defendant.

[46] Moreover, the plaintiff's affidavit 1 (encl. 14) which was filed to resist the defendant's application for summary judgment (on the defendant's counterclaim) has set out a string of issues which the plaintiff claims to be triable issues. One of the issues includes the factor which caused Anakku to severe business with the defendant. Placing the said affidavit in Part B will not unfairly prejudice the plaintiff as the plaintiff is the author of the said affidavits. All along with the facts and issues in the plaintiff's affidavit 1 are well within the knowledge of the plaintiff. Essentially, the plaintiff's affidavit 1 represents the issues in dispute between plaintiff and the defendant. It is the very facts and issues which the plaintiff relies on to defend itself against the defendant's defence and counterclaim.

[47] I am mindful by allowing encl. 99, the trial of this case could not proceed as scheduled. Having been satisfied there are valid and adequate grounds for this court to exercise its discretion to grant leave to amend as sought in encl. 99, such consequences are inevitable as it is vital for the plaintiff to be given time to prepare their supplementary witness statements (and serve it on the defendant) so that the plaintiff is not unfairly prejudiced and to avoid miscarriage of justice to the plaintiff. Further trial date has been fixed for this court to resume the trial.

Conclusion

[48] Premised on the aforesaid reasons, this court granted order in terms of the prayers sought in encl. 99 and that the defendant to pay costs of RM2,000 to the plaintiff.